



JOHN ODOYO OTIENO APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

(Being an Appeal from the Original conviction and sentence of the Principal Magistrate’s Court at Oyugis, Hon. Yalwala C.L in Oyugis SRMCR Case No. 2 of 2009 dated 9th day of February, 2010)

The appellant, **John Odoyo Otieno** was charged with the offence of attempted defilement contrary to section 9 (2) of the **Sexual Offences Act**, 2006. It is stated in the particulars of the charge that his victim one **A. K** was aged 15 years. The appellant pleaded not guilty to the offence and was tried and convicted by the Principal Magistrate’s Court at Oyugis. He was sentenced to serve 10 years in prison. The appellant has now appealed to this court against both conviction and sentence.

As far as can be discerned from the undated petition filed on 3rd December 2009 and written submissions presented to court on 7th February 2012 during the hearing of the appeal, the appellant’s complaints are that the trial court did not consider his mitigation. He had mitigated that he was a first offender; remorseful and came from a broken family hence deserving a non-custodial sentence; that the prosecution’s evidence was not credible; and, that no eye witnesses were called to testify. He further submitted that the testimony of PW2 to the effect that he held a panga and a rungu with one hand while forcefully holding the complainant down was not credible.

The state opposed the appeal through learned counsel **Mr. Mutai** who submitted that the conviction was based on sound evidence and that the prosecution proved its case beyond reasonable doubt. In his lengthy submissions, **Mr. Mutai** recalled the prosecution evidence, which I set out herebelow.

PW1 who is the complainant testified that she and another child, were sleeping in her brother’s house on the material day when the appellant suddenly entered the house and forced them out. The other child managed to escape when he grabbed and dragged her to a cassava farm nearby where he attempted to defile her. The complainant’s mother who was sleeping in their house nearby heard the commotion and raised an alarm. Neighbours responded and attempted to arrest the appellant but he escaped. He was later arrested and charged. The charge was proved against him and he was convicted and sentenced. **Mr. Mutai** asked the court to dismiss the appeal.

This is a first appeal. As such I am obligated to re-evaluate the evidence afresh. In so doing I am conscious have neither seen nor heard the witnesses and therefore must make an allowance for it. These principles were succinctly set out by the Court of Appeal in **Okeno –vs- Republic (1972) E. A 32**.

The question I ask myself is whether indeed it was the appellant who committed the offence.

The complainant, (PW1) testified how they were sleeping with other children at their brother’s house

when they heard some noise on the door. Subsequently the door was forced open and she saw the appellant enter and grab her and her sister. He dragged them outside. Her sister managed to wriggle away and ran to their mother's house to raise an alarm. The testimony of PW1 is corroborated by the testimony of PW2 who also testified to have seen the appellant when he entered the house and grabbed them. PW3 testified that on being woken up by PW2 she screamed and the neighbors responded. The appellant was found at the cassava farm but escaped before being arrested. PW4 **James Ouma Odhiambo** testified to having responded to screams in the neighborhood. Together with other young men, they found the appellant in a nearby cassava farm attempting to have sexual intercourse with the complainant. He was lying on top of her. PW4 testified that the appellant scared them away by brandishing a panga. He then escaped. PW4 testified that there was moonlight and he was able to see the appellant whom he knew.

The P3 report produced in court in respect of the complainant did not demonstrate evidence of penetration. **Dr. Peter Ogolla** (PW6) testified that the only finding was a bruise that the complainant had suffered on her left cheek bone. The court found sufficient evidence to put the appellant on his defence. He gave sworn testimony and did not call any witnesses.

In his testimony, the appellant stated that he was not at the scene of the incident on the material night. He stated that he was at his home sleeping and that he was arrested the following day. He denied committing the offence. The trial court after carefully analyzing both the prosecution case and the defence, convicted the appellant.

This case turns on the issue of recognition. PW1, PW2 and PW4 all testified having seen and recognized the appellant. PW1 and PW2 were sleeping in their brother's house when the appellant forced open the door and grabbed them. They recognized him. They knew him by his appearance and name as he was their neighbour. PW1 and PW2 testified that there was light from a lantern in the room. Outside there was moonlight. PW4 who responded to the alarm testified that he recognized the appellant in the cassava farm. He testified that there was moonlight.

I am satisfied having evaluated the testimony of PW1, PW2 and PW4 that they knew the appellant and that they recognized him. I am satisfied that he is the one who committed the offence.

The testimony of PW6, which he produced was not helpful to the prosecution case. By her admission, the complainant had stated that the appellant was stopped in his tracks before he defiled her.

The appellant's submissions at the hearing of the appeal amount to mere denials. He denied that he committed the offence. He also asked the court to be lenient to him in view of his disturbed childhood. At best, his submissions amount to further mitigation.

After evaluating the evidence I hold that the evidence upon which the appellant was convicted was sound. Consequently I uphold the conviction.

On the sentence I find and hold that the trial court imposed the minimum sentence provided by law. I consequently uphold the same.

For all the foregoing reasons, appeal is dismissed. The appellant has further right of appeal to the Court of Appeal.

Judgment dated, signed and delivered at Kisii this 25th day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

John Odoyo Otieno : Appellant (present/absent)

..... : Counsel for the respondent (present/absent)

..... : Court clerk

R. LAGAT-KORIR
JUDGE